Supreme Court, U.S.
FILED
DEC 13 2001
OFFICE OF THE CLERK

(5)

No. 01-618

IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT,
In his official capacity as Attorney General,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMICI CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND AND THE CATO INSTITUTE IN SUPPORT OF PETITIONERS

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

23pp

TABLE OF CONTENTS

Pages

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE DECISION BELOW IS IN THE MINORITY OF A 6-4 CIRCUIT SPLIT REGARDING THE ROLE OF *AMICI*. 4

II. RESOLVING THE CIRCUIT SPLIT REGARDING THE ROLE OF *AMICI* IS IMPORTANT TO THE PROPER ADMINISTRATION OF THE JUDICIAL SYSTEM AND THE FEDERAL RULES OF APPELLATE PROCEDURE. 6

III. THE FIRST AMENDMENT CONFLICT SHOULD BE RESOLVED PROMPTLY DUE TO THE NATIONWIDE CHILL CREATED BY THE CTEA AND THE DECISION BELOW. 11

IV. THE COPYRIGHT CLAUSE LIMITS CONGRESS POWER TO PROMOT[ING] THE PROGRESS OF SCIENCE. 15

CONCLUSION 18

TABLE OF AUTHORITIES

Pages

Cases

Bridges v. *City of Bossier*, 92 F.3d 329 (CA5 1996), *cert. denied*, 519 U.S. 1093 (1997) 5

CBS Broadcasting, Inc. v. *EchoStar Communications Corp.*, 265 F.3d 1193 (CA11 2001) 11

Corrosion Proof Fittings v. *EPA*, 947 F.2d 1201 (CA5 1991) 5

Florida Prepaid Postsecondary Educ. Expense Bd. v. *College Sav. Bank*, 527 U.S. 627 (1999) 13

Florida v. J.L., 529 U.S. 266 (2000) 9

Graham v. *John Deere Co.*, 383 U.S. 1 (1966) 15, 16

Gulf Power Co. v. *United States*, 187 F.3d 1324 (CA11 1999) 5

Harper & Row Publishers, Inc. v. *Nation Enters.*, 471 U.S. 539 (1985) 11, 12

Mapp v. *Ohio*, 367 U.S. 643 (1961) 9

Massachusetts Food Ass n v. *Massachusetts Alcoholic Beverages Control Comm n*, 197 F.3d 560 (CA1 1999), *cert. denied*, 529 U.S. 1105 (2000) 4

Montana v. *Egelhoff*, 518 U.S. 37 (1996) 9

National Comm n on Egg Nutrition v. *FTC*, 570 F.2d 157 (CA7 1977), *cert. denied*, 439 U.S. 821 (1978) 5

New Castle County v. *National Union Fire Ins. Co.*, 243 F.3d 744 (CA3 2001) 4

Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000) 9

Samuels, Kramer & Co. v. *CIR*, 930 F.2d 975 (CA2), *cert. denied*, 502 U.S. 957 (1991) 4

Schnapper v. *Foley*, 667 F.2d 102 (CADC 1981), *cert. denied*, 455 U.S. 948 (1982) 16

Suntrust Bank v. *Houghton Mifflin Co.*, 268 F.3d 1257 (CA11 2001) 12

Swan v. *Peterson*, 6 F.3d 1373 (CA9 1993), *cert. denied*, 513 U.S. 985 (1994) 6

Teague v. *Lane*, 489 U.S. 288 (1989) 9

Tyler v. City of Manhattan, 118 F.3d 1400 (CA10 1997) 6

United States v. *Matthews*, 209 F.3d 338 (CA4), *cert. denied*, 531 U.S. 910 (2000) 4

United States v. *Morrison*, 529 U.S. 598 (2000) 17

Rules

D.C. Cir. R. 29 9

Fed. R. App. P. 2 7

Fed. R. App. P. 29 ..... passim

Fifth Cir. Local R. 29.2 9

Supreme Court Rule 37 ..... 7, 10

Third Cir. Local App. R. 29.1 9

Other Authorities

1967 Adv. Comm. Note to Fed. R. App. P. 2 7

1967 Adv. Comm. Note to Fed. R. App. P. 29 7

1998 Adv. Comm. Note to Fed. R. App. P. 29 8

New Lexicon Webster s Dictionary (1994) 17

Ninth Cir. R. 29-1, Cir. Adv. Comm. Note 9

IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT,
In his official capacity as Attorney General,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

INTEREST OF AMICI CURIAE[1]

Eagle Forum Education & Legal Defense Fund (Eagle Forum ELDF) is an Illinois nonprofit corporation organized in 1981. Eagle Forum ELDF s mission is to enable conservative and pro-family men and women to participate in the process of self-government and public policy making so that America will continue to be a land of individual liberty, family integrity, and respect for the United States Constitution. One of the ways Eagle Forum ELDF performs these functions is through filing *amicus curiae* briefs in this Court and in the federal circuit courts of appeals. It thus has a significant in-

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

terest in the treatment of arguments by *amici* by this Court and other federal courts. Eagle Forum ELDF also has a significant interest in striking the retroactive provisions of the Sonny Bono Copyright Term Extension Act of 1998 (CTEA) as an overreaching by Congress beyond the limitations imposed by the Copyright Clause and the First Amendment.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato s Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government and to secure those rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends the Institute and the Center undertake a wide variety of publications and programs, including *amicus* briefs in the federal courts of appeals and this Court. The instant case raises squarely the question of the role of *amici* in the federal courts and thus is of central interest to Cato and the Center.[2]

SUMMARY OF ARGUMENT

This case raises important issues regarding the constitutional constraints upon Congress s copyright powers that have divided the courts of appeals. It also involves a significant and frequently-occurring issue regarding the role of *amici curiae* that impacts the administration of justice and likewise has divided the courts of appeals. In the course of rejecting petitioners position on the constitutional issues presented, the D.C. Circuit refused to consider additional arguments presented by *amici* in support of petitioners on those same issues, and thereby eliminated any role for *amici* solely because

[2] Cato joins Parts I & II of this brief regarding the role of *amici* in the courts of appeals, but takes no position on the merits of the First Amendment and Copyright Clause issues discussed in Parts III & IV.

those arguments had not been made or adopted by the parties in this case. That limitation on the role of *amici*, however, is contrary to Federal Rule of Appellate Procedure 29, every Local Rule that addresses the content of *amicus* briefs, and the approach taken by this Court and six circuit courts of appeals. Rule 29 and the majority of courts disfavor repetitive arguments by *amici* and affirmatively encourage *amici* to raise new legal arguments not raised by the parties. The approach now adopted by the D.C. Circuit and used in three other circuits, however, turns the role of *amici* on its head and harms the administration of justice by allowing the creation of precedent based on incomplete or erroneous constructions of law that will have impact far beyond the parties themselves.

Regarding the constitutional questions presented by the petition, the decision below is wrong on both textual and structural grounds. The First Amendment imposes a constraint on Congress copyright power that is not limited to, or satisfied by, copyright s idea/expression dichotomy. Particularly where new statutory provisions increase the burden on speech, traditional First Amendment scrutiny is appropriate for such provisions. The D.C. Circuit s categorical rejection of the First Amendment challenge to retroactive extension of copyrights thus is inconsistent with the limitations placed by the First Amendment on all exercises of Article I powers. The court s interpretation of the Copyright Clause also is inconsistent with the Constitution, rendering superfluous the very definition of Congress power To promote the Progress of Science. Unconditional retroactive extension of existing copyrights does not promote progress at all, and effectively eliminates the requirement that copyrights be granted only for limited Times.

ARGUMENT

I. THE DECISION BELOW IS IN THE MINORITY OF A 6-4 CIRCUIT SPLIT REGARDING THE ROLE OF *AMICI*.

Federal Rule of Appellate Procedure 29(a) provides that a non-governmental *amicus curiae* may file a brief * * * if the brief states that all parties have consented to its filing. Despite this express authorization to file an *amicus* brief where all parties have consented (as in this case), there is a circuit split over whether a court of appeals must consider supplemental arguments by *amici* that are relevant to the issues on appeal when the parties have not likewise made the same arguments to that court. The D.C. Circuit in this case takes the minority view that such supplemental arguments are not properly before the court.

At least six circuits will consider supplemental arguments raised by *amici* that are not also made by the parties on appeal. *See Massachusetts Food Ass n* v. *Massachusetts Alcoholic Beverages Control Comm n*, 197 F.3d 560, 567 (CA1 1999) (finding no need to allow intervention in order to raise new legal arguments because a court is usually delighted to hear additional arguments from able *amici* that will help the court toward right answers), *cert. denied*, 529 U.S. 1105 (2000); *Samuels, Kramer & Co.* v. *CIR*, 930 F.2d 975, 986 & n. 9, 988-990 (CA2) (considering argument by *amicus* regarding a phrase in Appointments Clause even though party relied upon different language and expressly rejected reliance on language argued by *amicus*), *cert. denied*, 502 U.S. 957 (1991); *New Castle County* v. *National Union Fire Ins. Co.*, 243 F.3d 744, 754 (CA3 2001) (noting that [o]f the three briefs submitted in this case, only the *amicus* attempts a public policy argument, and addressing that argument); *United States* v. *Matthews*, 209 F.3d 338, 344 n. 3 (CA4) (addressing the merits of an argument expressly eschewed by the party at oral argument but raised by one of his *amici*), *cert. denied*,

531 U.S. 910 (2000); *Bridges* v. *City of Bossier*, 92 F.3d 329, 335 n. 8 (CA5 1996) (allowing argument first raised by *amicus* but which had not been argued by appellant in the district court or in his initial brief on appeal, and *citing Corrosion Proof Fittings* v. *EPA*, 947 F.2d 1201, 1208 (CA5 1991), for the proposition that the court can consider different arguments raised by *amicus curiae* on issues raised by appellant), *cert. denied*, 519 U.S. 1093 (1997); *Gulf Power Co.* v. *United States*, 187 F.3d 1324, 1330-31 (CA11 1999) (addressing on the merits different arguments from *amici* on a takings question).

Contrary to that wide acceptance of new *amicus* arguments on existing issues, however, the D.C. Circuit in this case held that it would not consider an argument by *amicus* relating to the proper construction of the Copyright Clause and to the circuit s erroneous precedent on the matter because it claimed that the argument is rejected by the actual parties to this case and therefore is not properly before the court. Pet. App. 11a. The court further claimed that because the plaintiffs conspicuously failed to adopt the argument of the *amicus*, the Government was not alerted to any need to argue this point and did not do so. *Id.*; *see also id.* at 16a (argument made by *amicus* may only be considered in a future case in which a party to the litigation argues the point); *id.* at 25a (opinion on rehearing) (even viewing the issue broadly, we would still not reach what would then be the supporting argument of the *amicus*); *id.* at 26a (because the plaintiffs-appellants did not take the same tack as the *amicus*, the Government did not on brief address the district court s interpretation of this court s decision in *Schnapper*).

Three other circuits similarly will not consider supplemental arguments on appeal by *amici* unless the parties have likewise made the same argument. *See National Comm n on Egg Nutrition* v. *FTC*, 570 F.2d 157, 160 (CA7 1977) (holding that because *amicus* argument was not made before the FTC or even by the petitioners themselves in this court [it] is

therefore not properly before us), *cert. denied*, 439 U.S. 821 (1978); *Swan* v. *Peterson*, 6 F.3d 1373, 1383 (CA9 1993) (holding that while new *amicus* arguments may be allowed on limited subjects, such as jurisdiction, that could be raised *sua sponte*, because the parties did not adopt *amicus* argument by reference in their brief and none of the other exceptions apply, it would not consider the argument by *amicus*), *cert. denied*, 513 U.S. 985 (1994); *Tyler v. City of Manhattan*, 118 F.3d 1400, 1404 (CA10 1997) (declining to consider argument by *amicus* where party did not adopt *amicus* argument by reference in his brief and the exceptions listed by the Ninth Circuit in *Swan* did not apply).

The broad circuit split regarding whether supplemental *amicus* arguments not expressly adopted by the parties may be considered by the courts of appeals should be resolved by this Court. That issue is significant not just to matters of local circuit administration, but to the proper construction of the Federal Rules of Appellate Procedure and to the administration of justice in general.

II. RESOLVING THE CIRCUIT SPLIT REGARDING THE ROLE OF *AMICI* IS IMPORTANT TO THE PROPER ADMINISTRATION OF THE JUDICIAL SYSTEM AND THE FEDERAL RULES OF APPELLATE PROCEDURE.

Amici curiae, particularly at the appellate level, play an important role in the administration of justice. As cases move higher up in the judicial system, their effective impact rapidly expands beyond the particular parties or the local district, and encompasses persons in multiple states and throughout the country as a whole. That expanding impact is particularly noticeable in the D.C. Circuit, where the court often rules on nationwide programs and sets precedent with impact far beyond its geographic borders. Given the reach of such decisions, it is important that courts of appeals remain open to consideration of all legal *arguments* relevant to the resolution of *issues* properly before them.

The split in authority regarding the role of *amici* is especially troubling because the minority view excluding new *amicus* arguments is contrary to the Federal Rules of Appellate Procedure. As noted above, *amici* having the consent of the parties need no further authority to file their briefs. Their right to file in such circumstances is provided directly by the Federal Rules.

When adopted in 1967, Rule 29 regularized the treatment of *amicus* briefs, which previously had been regulated by local rule in only five circuits. The new Federal Rule followed the majority practice in the circuits by requiring leave of court to file an *amicus* brief, except under the circumstances of filing by certain government entities or filing with consent of the parties. 1967 Adv. Comm. Note to Fed. R. App. P. 29.[3]

The 1998 amendments to Rule 29 made a number of substantive changes that clarified the role of *amici* under the Rules. In discussing a new requirement that an *amicus* seeking leave to file from the court state the relevance of the matters discussed in its brief, the Advisory Committee clarified the role of *amici* by quoting from Supreme Court Rule 37.1:

> An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An *amicus curiae* brief which does

---

[3] Federal Rule of Appellate Procedure 2 provides that a court of appeals may to expedite its decision or for other good cause suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b). The primary purpose of this rule is to grant power to courts of appeals to expedite the determination of cases of pressing concern to the public or to litigants by prescribing a time schedule other than that provided by the rules and to relieve litigants of the consequences of defaults under the rules where manifest injustice would otherwise result. 1967 Adv. Comm. Note to Fed. R. App. P. 2. Neither circumstance is relevant to this case or to the general issue of whether a court must consider different arguments timely presented by *amici* on the issues presented in a case.

not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored.

1998 Adv. Comm. Note to Fed. R. App. P. 29, subd. (b).

The clear expectation is that *amici* in the courts of appeals, no less than in the Supreme Court, will say something new something not already said by the parties and that significant overlap between the arguments of the parties and the *amici* would be considered a burden on the courts. That expectation is confirmed by the shorter page limits for *amicus* briefs provided in the 1998 amendments. As explained in the Advisory Committee Notes, such shorter limits are appropriate because an *amicus* brief is supplemental and should treat only matter not adequately addressed by a party. 1998 Adv. Comm. Note to Fed. R. App. P. 29, subd. (d).

The propriety of supplemental arguments also is reflected in the requirement that the brief must be filed no later than 7 days after the principal brief of the party being supported is filed, unless the court grants leave for later filing. Fed. R. App. P. 29(e). As explained by the Advisory Committee, the 7-day stagger was adopted because it is long enough to permit an *amicus* to review the completed brief of the party being supported and avoid repetition argument. 1998 Adv. Comm. Note to Fed. R. App. P. 29, subd. (e). The stagger is sufficiently short so that the opposing party will have sufficient time to review arguments made by the *amicus* and address them in the party s responsive pleading. *Id.*

Most circuits have found it unnecessary to supplement the Federal Rules concerning the nature of *amicus* participation. Four circuits, however, have confirmed through local rules the essential point that *amici* are expected to make new arguments, not merely echo the parties. The D.C. Circuit, for example, has the most forceful reiteration of this basic point, requiring that an *amicus* brief must avoid repetitious of facts or legal arguments made in the principal (appellant/petitioner or appellee/respondent) brief and focus on points not made or

adequately elaborated upon in the principal brief, although relevant to the issues before this court. D.C. Circuit Rule 29. Local Rules from three other circuits are to similar effect.[4]

Moreover, this Court itself has considered arguments and even *claims* raised on appeal only by an *amicus*. In *Teague* v. *Lane*, 489 U.S. 288, 300 (1989), this Court addressed a retroactivity argument notwithstanding that [t]he question of retroactivity with regard to petitioner s fair cross section claim has been raised only in an *amicus* brief. Likewise, in *Mapp* v. *Ohio*, 367 U.S. 643, 646 n. 3 (1961), this Court noted, in the course of overruling prior precedent, that [a]lthough appellant chose to urge what may have appeared to be the surer ground for favorable disposition and did not insist that *Wolf* be overruled, the *amicus curiae* * * * did urge the Court to overrule *Wolf*. *See also Florida v. J.L.*, 529 U.S. 266, 272 (2000) (addressing the merits of a separate *amicus* argument on the reliability of a tip); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 395 n. 7 (2000) (addressing the merits of an *amicus* argument that contribution limits were insufficiently narrow for First Amendment purposes in light of other means of addressing the harms alleged); *Montana* v. *Egelhoff*, 518 U.S. 37, 46-48 (1996) (considering the merits of *amicus* alternative theory of a due process violation). Given that Rule 29 is expressly modeled on this Court s own

---

[4] *See* Third Cir. Local App. R. 29.1 (for *amicus* briefs on rehearing: Before completing the preparation of an *amicus* brief, counsel for an *amicus curiae* shall attempt to ascertain the arguments that will be made in the brief of any party whose position the *amicus* is supporting, with a view to avoiding any unnecessary repetition or restatement of those arguments in the *amicus* brief.); Fifth Cir. Local R. 29.2 (an *amicus* brief should avoid the repetition of facts or legal arguments contained in the principal brief and should focus on points either not made or not adequately discussed in those briefs); Ninth Cir. R. 29-1, Cir. Adv. Comm. Note (Movants are reminded that the court will review the *amicus curiae* brief in conjunction with the briefs submitted by the parties, so that *amicus* briefs should not repeat arguments or factual statements made by the parties.).

Rule 37, the practice of this Court is instructive on the proper interpretation of Rule 29 in the courts of appeals.

Federal Rule of Appellate Procedure 29 provides a uniform rule that contemplates significant and non-redundant participation by *amici curiae*. Alternative legal arguments on existing issues fit precisely within the purpose of that Rule. The approach taken by the D.C. Circuit, however, effectively destroys the role of *amici*, or forces them to do exactly what the rules declare they should avoid merely repeat or embellish the arguments already made by the parties. As Judge Sentelle correctly noted in his dissent from the panel decision, *amicus* in this case did precisely what was required of it in avoiding repetition of facts or legal arguments already made, and its supplemental arguments should have been considered fully on the merits. Pet. App. 22a. By refusing to consider those arguments, the D.C. Circuit s decision effectively eliminates any role for *amicus curiae* in the practice of the circuit. *Id.* at 28a (Sentelle, J., dissenting from the denial of rehearing *en banc*).

> If allowed to stand, this holding will effectively bar future *amici* from adding anything except possibly rhetorical flourish to arguments already outlined and embraced by the parties. This is particularly the case for those *amici* who, true to their traditional role as friends of the court, operate independently to assist the Court in its determinations.

Id. at 31a. Because Federal Rule 29 eschews such a useless and court-burdening role for *amici*, and because the circuits are split over this important question for the administration of the appellate courts, this Court should grant the petition and re-establish the uniform and sensible approach contemplated by Rule 29.

III. The First Amendment Conflict Should Be Resolved Promptly Due to the Nationwide Chill Created by the CTEA and the Decision Below.

The D.C. Circuit below held that copyrights are categorically immune from challenges under the First Amendment. Pet. App. 6a. As petitioners correctly note, such a categorical exclusion of Congress copyright power from First Amendment scrutiny conflicts with the approach adopted by the Eleventh Circuit. *See* Pet. 22-23 (discussing *CBS Broadcasting, Inc.* v. *EchoStar Communications Corp.*, 265 F.3d 1193 (CA11 2001)). Because much of the confusion in this area is a function of potentially ambiguous guidance from this Court in *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539 (1985), it will not be resolved until this Court clarifies the constitutional truism that all of Congress enumerated powers are subject to, and constrained by, the First Amendment.

In *Harper & Row*, this Court addressed the situation where the defendant effectively arrogated to itself the right of first publication. 471 U.S. at 549. This Court quoted with approval the statement that copyright s idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author s expression. *Id.* at 556 (citation omitted). That statement, unfortunately, has been taken to mean that so long as the idea/expression dichotomy is in place, no other aspect of copyright law is subject to First Amendment scrutiny. Such an extreme conclusion, however, goes too far. To say, in the context of the first-publication right in *Harper & Row*, that copyright may protect expression without violating the First Amendment is a far cry from saying that the First Amendment allows *any* form of restriction to be placed on expression rather than ideas. And, indeed, this Court did not make such a sweeping ruling. Rather, it merely rejected a

reading of the First Amendment that would effectively destroy any expectation of copyright protection in the work of a public figure, *id.* at 557, and thus completely override core aspects of the copyright power. That this Court took the time to note copyright s positive effects on First Amendment values in the context of that case, *id.* at 559, actually demonstrates the propriety of a targeted First Amendment analysis rather than simply applying a categorical rule excepting all copyright restrictions on expression from First Amendment scrutiny.

While the exercise of the copyright power will, in many instances, survive First Amendment scrutiny, the provisions of the Copyright Act in general, and each new expansion of that Act in particular, are nonetheless subject to such scrutiny and the survival of each added speech restriction is not preordained. The establishment of fair use, first as a judicial doctrine and then as a statutory rule, illuminates that point. As the Eleventh Circuit recently observed in *Suntrust Bank* v. *Houghton Mifflin Co.*, 268 F.3d 1257, 1264 (CA11 2001), prior to 1976, fair use was a judge-made right developed to preserve the constitutionality of copyright legislation by protecting First Amendment values. In 1976, however, Congress amended the Copyright Act and effectively increased its restriction on speech by eliminating the requirement that authors publish their works in order to receive copyright protection. The statute, however, also codified fair use as a limitation on copyright. Had fair use not been recognized as a right under the 1976 Act, the statutory abandonment of publication as a condition of copyright that had existed for over 200 years would have jeopardized the constitutionality of the new Act because there would be no statutory guarantee that new ideas, *or new expressions* of old ideas, would be accessible to the public. *Id.* (emphasis added). Notwithstanding the idea/expression dichotomy, therefore, the newly restrictive aspect of the 1976 Copyright Act was saved from likely con-

stitutional infirmity by an independent accommodation of the First Amendment interests threatened.

The latest restriction added to the Copyright Act a retroactive twenty-year extension of existing monopolies should likewise be considered separately from past endorsements of the Act in order to see whether such new restriction can survive the First Amendment or whether the burden on speech exceeds the trivial and speculative benefit alleged by the government. When conducting such review, it is important to keep first principles firmly in mind.

As this Court has recently reiterated in another context, Article I powers do not supersede restrictions created by Amendments. *See, e.g., Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 635-36 (1999) (provision that [a]ny State * * * shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court * * * for infringement of a patent was unconstitutional, in part because Congress may not abrogate state sovereign immunity pursuant to its Article I powers). Rather, Amendments to the Constitution narrow congressional authority that would otherwise exist under Article I standing alone. The First Amendment question is whether government action is unconstitutional *despite* Congress enumerated power. The constitutional hierarchy is no different in the case of copyright law. A law within Congress s copyright power may *still* be prohibited by the First Amendment.

Once it is conceded that the First Amendment is indeed a restraint on the copyright power, it is not enough simply to rely upon the idea/expression dichotomy, particularly as new restrictions are added to the Copyright Act. The notion that copyright only restricts particular expression, not the underlying ideas, and hence is not subject to further First Amendment scrutiny, is mistaken. The First Amendment protects not only the conveyance of concepts generally, but the particular form

of expression as well. It generally is left to the speaker to decide not merely what to say, but also how to say it, and the First Amendment protects the intangible value associated with a particular expression independently from the underlying idea.[5] Indeed, in the case of music and much poetry and art, there may not be much of an underlying idea at all beyond the descriptive beauty conveyed through the particularized expression. Yet such work is protected by the First Amendment as well as by copyright, and the idea/expression dichotomy is insufficient to accommodate the First Amendment interests at stake.

With Congress having retroactively redrawn the balance between the public domain and private authors, this Court should balance anew the First Amendment considerations implicated by that retroactive change. The gain from such an extension does not involve any *addition* to the incentive for authors to create new work, but rather involves only the pure speculation that the unconditional extension might encourage some authors to preserve existing works that they had not bothered to preserve during the existing term of their copyright. But an additional twenty years of retroactive monopoly is a significant burden on First Amendment values. The extension will hinder access to numerous works that would soon enter the public domain and that need no additional incentive for preservation. And the CTEA will chill the public use of works having uncertain status or whose authors are not readily located because few persons will risk the criminal penalties for unauthorized use of such works.

Given the ongoing and irreparable burden on petitioners and the public s First Amendment rights, this Court should grant the petition for certiorari in this case rather than wait for

---

[5] The government could not, consistent with the First Amendment, restrict publication of works by Plato or Marx on the theory that the ideas could still be conveyed through other expression.

further cases that may be exceedingly slow in developing due to the chill imposed by the CTEA.

IV. THE COPYRIGHT CLAUSE LIMITS CONGRESS POWER TO PROMOT[ING] THE PROGRESS OF SCIENCE.

Petitioners correctly argue that the decision below warrants review because its erasure of the promote the Progress language from the Copyright Clause conflicts with the construction of that Clause by this Court and by other circuits. *See* Pet. 12-17. By unmooring the grant of exclusive rights from the very power that such grants were meant to support, the court below has done great damage both to the Copyright Clause and to the notion of limited and enumerated powers.

On the merits, the decision below misconstrues the Copyright Clause and largely ignores the arguments made by *amicus*. Despite recognizing petitioners argument that the limited Times requirement is informed by the goal of promot[ing] the Progress of Science and useful Arts, Pet. App. 4a, the D.C. Circuit nonetheless refused to rule upon the argument by *amicus* Eagle Forum ELDF that the promote the Progress language of the Copyright Clause defines, and therefore delimits, congressional power in this area as promot[ing] the Progress of Science. The structure of the clause defines a power to do X by means of Y. In the case of the copyright power, X to promote the progress of science is not a superfluity; it *is* the power granted to Congress. The remainder of the clause by securing for limited Times, etc. is not an affirmative grant; it is a negative limit on the *means* by which the power [t]o promote may be exercised.

This Court has recognized the correct structural reading of Article I, section 8 in the context of the Patent Clause. In *Graham* v. *John Deere Co.*, this Court stated:

> The clause is both a grant of power and a limitation. This qualified authority * * * *is limited to the promotion of advances* in the useful arts. * * * The Congress in

> the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. * * * [A patent system] by constitutional command must promote the Progress of * * * useful Arts. *This is the standard expressed in the Constitution and it may not be ignored.*

383 U.S. 1, 5-6 (1966) (emphasis added). If patent laws must promote the Progress of * * * useful Arts, then surely copyright laws similarly must promote the Progress of Science, and Congress copyright power is limited accordingly.

Despite this seemingly self-evident construction of the Copyright Clause, the D.C. Circuit instead chose to rely upon its earlier decision in *Schnapper* v. *Foley*, 667 F.2d 102, 112 (CADC 1981), *cert. denied*, 455 U.S. 948 (1982), holding that the introductory language of the Copyright Clause does not limit this power. While petitioners had sought to work around *Schnapper* by arguing that the introductory language nonetheless must inform the construction of the limited Times language in the Copyright Clause, *amicus* took a more direct approach, arguing variously that *Schnapper* could be read more narrowly to allow the correct interpretation of the promote language, that *Schnapper* s language to the contrary was at best *dicta*, or that the case should simply be overruled *en banc* because the purported holding was plainly wrong. *See* Br. of Eagle Forum ELDF, at 6 & n. 3.

On the question of whether the CTEA in fact promotes the progress of science, retrospective extension of existing copyrights does nothing to induce the creation of additional writings and hence does not promote science. As for the D.C. Circuit s claim that such extension encourages the preservation of existing works, retroactive promotion of preservation does not constitute promotion of *progress*.[6] Progress in-

[6] The court below discussed this argument in the hypothetical, offering its advisory views on the topic despite refusing to consider and rule formally on the arguments of *amicus*. *See* Pet. App. 12a (*If* called upon to do so, therefore, we *might well* hold that the application of the CTEA to subsisting copyrights was a necessary and proper action promoting the progress of science) (emphasis added).

volves forward movement, advancement, and creation, whereas preservation involves the very different realm of stasis and avoidance of decay. *Compare* New Lexicon Webster s Dictionary 799 (1994) (Progress means forward movement, improvement, advancement), *with id.* at 792 (preserve * * * to keep up, maintain, prevent from ruin or decay). While preservation might *benefit* science or the public generally, authorizing the promotion of mere preservation would effectively nullify the word Progress and more broadly empower Congress to promote science *in toto*.

Furthermore, because the retroactive extension is not conditioned on any further action by copyright holders, there is no credible reason to believe that the extension will induce owners to preserve any works that they have, by hypothesis, already neglected for years. The CTEA thus does not promote progress or anything else because the connection between the given right and the supposed benefit is too attenuated and speculative. As this Court observed in *United States* v. *Morrison*, 529 U.S. 598, 615 (2000), reasoning that follows a but-for causal chain * * * to every attenuated effect implicating an enumerated power is unworkable if we are to maintain the Constitution s enumeration of powers. While it might be different if the retroactive extension were somehow conditioned on further acts of creativity, merely throwing monopoly rights at people in the attenuated *hope* they use them beneficially only mocks the constitutional enumeration.[7]

[7] It is highly doubtful whether Congress could grant a *new* copyright for the preservation of an existing work. Such a copyright would appear to violate the requirement of originality and the prohibition against removing works from the public domain. Yet that is precisely the effect of retroactively extending copyrights: Granting more years of exclusive rights in return for the hope of preservation of works that otherwise would enter the public domain in due course.

Handing Disney a gift of twenty more years on the copyright for Mickey Mouse, without even requiring that it convert the copyrighted material into a format that will be preserved *and available* for public use in the future, is not the promotion of progress, it is simply corporate welfare.

Finally, regarding the nature of the limited Times allowed for exclusive rights to writings, the approach taken below drains meaning from that language. The correct construction recognizes that the Copyright Clause s use of the plural Times matches the plural Writings and Discoveries, but that its use of the singular the exclusive Right suggests only a singular Time[] per each writing or discovery. That interpretation requires Congress to select a time and stick to it for copyrights already granted, though it could modify the Time[] prospectively as to any future copyright. It also has the benefit of avoiding the seriatim grant of supposedly limited copyright terms that could, as a practical matter, be repeated indefinitely. Under the approach endorsed by the D.C. Circuit, for example, the copyright on Mickey Mouse already has received two approximately twenty-year extensions, and the court of appeals suggests no legal principle that could prevent the next extension twenty years hence, or any other extension *ad infinitum*. Absent some theory limiting such repetition, the decision below renders the limited Times language meaningless.

Because the decision below eviscerates the enumerated limits on the copyright power, and because it conflicts with decisions from this Court and other courts of appeals, it warrants plenary review.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amici Curiae

Dated: December 13, 2001.